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SUPREME COURT
STATE OF WASHINGTON

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NO. 80169-0
COA NO. 34331-2-II

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RANDY J. SUTHERBY,

Respondent.

In re Personal Restraint of

RANDY J. SUTHERBY,

Petitioner.

STATEMENT OF SUPPLEMENTAL AUTHORITY

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Pursuant to RAP 10.8, Randy J. Sutherby, respondent in the direct appeal and petitioner in the consolidated personal restraint petition, cites the following additional authorities:

1. State v. Montgomery, ___ P.3d ___, 2008 WL 2054626 (Wash. Supreme Court, May 15, 2008), at ¶ 25 (bold italics added):

[T]his court has held that *there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions*, particularly expressions of personal belief, *as to* the guilt of the defendant, the intent of the accused, or *the veracity of the witness*.

2. Lane v. State, ___ S.W.3d ___, 2009 WL 2133207, at 5-6, May 20, 2008) (bold italics added):

Appellant claims he received ineffective assistance of counsel, in part, because his trial counsel failed to properly challenge and exclude Dr. Thompson's testimony regarding the rarity of false allegations of sexual assault by children. Appellant also complains of his trial counsel's failure to lodge any objection to the testimony of Ms. Engler regarding her opinion E.A. had post-traumatic stress disorder caused by childhood sexual abuse. According to appellant, both experts' testimony was inadmissible because it constituted opinion testimony on complainant's truthfulness. Because *there can be no plausible trial strategy for failing to properly challenge Dr. Thompson's testimony or failing to lodge any objection to Ms. Engler's testimony, we agree with appellant this is a case in which the record on appeal is sufficient to decide whether appellant's trial counsel's performance was deficient*.

Because it is jurors who must decide the credibility of the parties in issue, *expert opinions on the truthfulness of a child complainant's allegations* or that of a class of persons the complainant belongs to is truthful, *is prohibited*. [Citation]. Dr. Thompson's testimony that

false allegations of childhood sexual assault are very rare had the effect of telling the jury they could believe E.A.'s testimony, which is expressly forbidden. [Citation]. In addition, Ms. Engler's testimony she counseled complainant for fourteen weeks and determined E.A. had been sexually assaulted was direct testimony the complainant was truthful, which is also prohibited. [Citation].

The fact appellant's trial counsel lodged an objection to Dr. Thompson's testimony indicates he was aware this testimony was inadmissible. {Footnote omitted}. However, once the trial court sustained the objection, appellant's trial counsel failed to take the required next step to preserve appellate review by moving to instruct the jury to disregard the improper testimony. [Citation]. In addition, by failing to lodge any objection to Dr. Thompson's subsequent testimony and the testimony of Ms. Engler, appellant was precluded from appellate review of that testimony. [Citation]. Even though there is nothing in the record on appeal explaining appellant's trial counsel's subjective trial strategy for allowing this testimony in evidence, *there is no conceivable strategy that would justify allowing this inadmissible testimony in front of the jury.* [Citations]. *Accordingly, we determine appellant' trial counsel's performance was deficient.*

* * *

Having determined appellant's trial counsel's performance was deficient, we must decide if, as a result of that performance, there is a reasonable probability that, but for trial counsel's deficient performance, the result of the trial would have been different. [Citation]. . . .

The facts of this case distinguish it from the cases cited by appellant in support of his argument he was prejudiced by his trial counsel's deficient performance. *In each of appellant's cases, there was no eyewitness testimony corroborating the victim's eyewitness testimony that he or she had been sexually assaulted. See Fuller [v. State], 224 S.W.3d [823,] at 837 ("this case was a swearing match between the complainant and the [defendant]."); Sessions*

[v. State], 129 S.W.3d [242,]at 245 (the court of appeals stated there was no medical evidence of sexual assault and the primary issue at trial was the credibility of the complainant). *Here, because E.A.'s sister corroborated significant details of E.A.'s testimony regarding the abuse, resolution of the credibility issue was not dependent upon the challenged expert testimony. . . .* Accordingly, we hold appellant has not established the second *Strickland* prong . . .

3. Miller v. State, 757 S.W.2d 880, at 882 & 884 (Tex. App. 1988)

(bold italics added):

Complainant's mother testified:

[PROSECUTOR] Okay. Now there's been some testimony from [complainant's stepmother] that occasionally your son has trouble about telling lies and that she can't always figure out, you know, when he hasn't been telling the truth. Does your son lie to you about certain things?

A. Yes, sir, he lies to me about his homework at school. Mostly school. But –

* * *

Q. Now, when he told you about this – what this man had [appellant] had done to him, *do you think he was lying about that?*

A. *No, sir.*

* * *

In the present case we can glean no sound trial strategy in defense counsel's failure to object to the extensive, inadmissible testimony concerning the only real issue at trial – complainant's credibility. Thus, *we hold that defense counsel's performance at trial was deficient and resulted in denying appellant the effective assistance of counsel.*

DATED this 2nd day of June, 2008.

CARNEY BADLEY SPELLMAN, P.S.

By 
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Of Attorneys for Respondent/Petitioner Sutherby